justice. Bearing in mind that this "Affidavit in Opposition" was filed one month after the creditor's petition was served on him and contained multitude of grounds other than the existence of a counterclaim or set-off or cross demand, he should have made a formal application by motion supported by this affidavit in compliance with r. 18, which reads:

> Applications to be made by motion.
>
> Except where these Rules or the Act otherwise provide, every application to the Court shall, unless the Court otherwise directs, be made by motion supported by affidavit.

In our opinion, failure on the part of the appellant to follow r. 18 renders his "Affidavit in Opposition" ineffective and bad in law because unless the Court otherwise directs, challenges to the creditor's petition or bankruptcy notice other, than that he has a counterclaim, set-off or cross demand which equals or exceeds the judgment debt, must be made by filing a notice of motion supported by an affidavit. Unfortunately, he has failed to do so in this case.

In passing, we wish to emphasise that, contrary to what had been expressed in *Soh Bok Yew (supra)*, if a bankruptcy petition is to be founded on an act of bankruptcy based on a failure to comply with a bankruptcy notice, it is self-evident that such a petition can only be filed after the application to set aside the bankruptcy notice is heard and dismissed.

For the above reasons, we dismissed the appeal with costs.

FIRST MALAYSIA FINANCE BERHAD

v.

DATO' MOHD FATHI BIN HAJI AHMAD

SUPREME COURT, KUALA LUMPUR
DATUK HJ. MOHD JEMURI BIN SERJAN CJ (BORNEO), TAN SRI DATO' EDGAR JOSEPH JR., DATUK MOHAMED DZAIDDIN BIN HJ. ABDULLAH SCJJ.
[CIVIL APPEAL NO. 02-62-91]
9 JUNE 1993

PRACTICE & PROCEDURE: Application to strike out action against fifth defendant- Order 18 rule 19 Rules of the High Court 1980 - Plaintiff's action against fifth defendant for discovery - Whether discovery can amount to a cause of action - Whether plaintiff's claim against fifth defendant disclosed reasonable cause of action - Whether statement of claim frivolous, vexatious or an abuse of the process of the Court.

The plaintiff, the beneficial owner of shares in the fifth defendant, had by several sales and purchase agreements contracted with the first, second, third and fourth defendants to sell the shares to them. The plaintiff sued the first to the fourth defendants for the purchase price and their defence was that in accordance with the mode of payment stipulated in the agreements, the purchase price had been paid to the account of several companies under the control of the plaintiff which had obtained loans from the fifth defendant.

The plaintiff's claim against the fifth defendant was for information relating to the alleged payment by the first to the fourth defendants and for discovery of the relevant accounts. The trial Court Judge found that the plaintiff had brought himself within the ambit of the exception of the the principle in *Norwich Pharmacal Co. v. Customs and Excise Commissioners* and held that in the special circumstances of the case an action for discovery alone could exist and dismissed the fifth defendants' application to strike out the action. The fifth defendant appealed.

Held:

[1] Unlike the *Norwich Pharmacal* case , the present case was one where the identity of those who where alleged by the plaintiff to have committed the wrongful acts *vis-a-vis* the plaintiff were known to the plaintiff and,

indeed they had been cited as the first to the fourth defendants in the action.

[2] The cause of action pleaded against the first to the fourth defendants was grounded in contract so there was no question of the plaintiff being able to invoke the exception defined by the House of Lords in the *Norwich Pharmacal* case, namely, that if through no fault of his own, a person gets involved in the tortious acts of others so as to facilitate their wrongdoing, whilst he may incur no personal liability, he comes under a duty to assist the person who has been wronged by giving him full information and disclosing the identity of the wrongdoers. On this ground alone there was no question of the fifth defendant being such a person within the meaning of the exception.

[3] The obligation incurred by the first to the fourth defendants to make payments of the purchase price to the borrower's account being purely contractual, no third party could be said to be mixed up in a contractual situation because of the doctrine of privity.

[4] The learned Judge was in error, in holding that "primarily" the plaintiff's claim against the fifth defendant was an action for discovery merely because the plaintiff had also prayed for other reliefs in his statement of claim. The Judge ought to have held that the plaintiff's action against the fifth defendant was for discovery alone.

[5] The information which the plaintiff had sought from the fifth defendant was an attempt to verify the defence advanced by the first to the fourth defendants. The onus of establishing a defence of discharge by payment would clearly lie on the first to the fourth defendants, and it will therefore be for them to properly substantiate that defence by adducing the necessary contemporary documentary evidence.

[6] The borrower companies into whose account with the fifth defendant, the first to the fourth defendants claimed to have made the payments, are all companies controlled by the plaintiff, and it was difficult to see why these companies may not authorise disclosure of the required information notwithstanding s. 97 of the Banking and Financial Institutions Act.

[Appeal allowed with costs. Plaintiff's claim against fifth defendant struck out].

[**Bahasa Malaysia** Translation of Headnote]..

AMALAN DAN PROSEDUR: Permohonan untuk membatalkan tindakan terhadap defendan kelima - Aturan 18, Kaedah-kaedah Mahkamah Tinggi 1980 - Tindakan plaintif terhadap defendan kelima bagi penzahiran - Sama ada penzahiran boleh terjumlah kepada kausa tindakan - Sama ada tuntutan plaintif terhadap defendan kelima mendedahkan tindakan kausa tindakan yang munasabah - Sama ada pernyataan tuntutan remeh, menyusahkan atau merupakan penyalahgunaan proses Mahkamah.

Plaintif, pemilik benefisial akan saham-saham defendan kelima, telah melalui beberapa perjanjian jual-beli berkontrak dengan defendan-defendan pertama, kedua, ketiga dan keempat untuk menjual saham-saham berkenaan kepada mereka. Plaintif menyaman defendan-defendan pertama hingga keempat bagi harga belian dan pembelaan mereka ialah bahawa mengikut bentuk pembayaran yang ditetapkan dalam perjanjian-perjanjian berkenaan, harga belian telah dibayar kepada akaun beberapa buah syarikat di bawah kawalan plaintif yang telah memperolehi pinjaman daripada defendan kelima.

Tuntutan plaintif terhadap defendan kelima adalah untuk maklumat berhubung dengan pengataan pembayaran oleh defendan-defendan pertama hingga keempat dan bagi penzahiran akaun-akaun yang berkenaan, Hakim Mahkamah perbicaraan tersebut mendapati bahawa plaintif tergolong dalam lingkungan pengecualian prinsip dalam kes *Norwich Pharmacal Co. v. Customs and Excise Commissioner*s dan memutuskan bahawa dalam keadaan-keadaan khas kes tersebut, satu tindakan bagi penzahiran sahaja boleh wujud dan menolak permohonan defendan kelima untuk membatalkan tindakan plaintif. Defendan kelima membuat rayuan.

Diputuskan:

[1] Tidak seperti kes *Norwich Pharmacal*, kes semasa ini ialah satu kes di mana identiti mereka yang didakwa oleh plaintif sebagai telah melakukan tindakan yang salah *vis-a-vis* plaintif adalah diketahui oleh plaintif dan mereka telah dinamakan sebagai defendan pertama hingga keempat dalam tindakan berkenaan.

[2] Kausa tindakan yang diguamkan terhadap defendan-defendan pertama hingga

keempat adalah didasarkan dalam kontrak berkenaan, jadi tiada persoalan mengenai plaintif untuk dapat menggunakan pengecualian yang ditakrifkan oleh Dewan Pertuanan (House of Lords) dalam kes *Norwich Pharmacal*, iaitu, bahawa jika bukan kerana salahnya, seseorang itu terlibat dalam tindakan berbentuk tort oleh orang lain bagi memudahkan salahlaku mereka, dan tiada apa-apa liabiliti yang ditanggung olehnya sendiri, ia berkewajipan untuk membantu orang yang telah menjadi mangsa perbuatan berkenaan dengan memberikannya maklumat penuh dan mendedahkan identiti pesalahlaku. Atas alasan ini sahaja tiada persoalan bahawa defendan kelima adalah tergolong dalam lingkungan maksud pengecualian tersebut.

[3] Memandangkan obligasi yang ditanggung oleh defendan-defendan pertama hingga keempat untuk membuat pembayaran akan harga belian tersebut kepada akaun peminjam sebagai kontraktual semata-mata, tidak boleh diperkatakan bahawa ada pihak ketiga terlibat dalam suatu keadaan kontraktual disebabkan oleh doktrin priviti.

[4] Hakim yang arif tersebut telah tersilap dalam memutuskan bahawa "pada asasnya" tuntutan plaintif terhadap defendan kelima adalah suatu tindakan bagi penzahiran hanya kerana plaintif telah juga memohon untuk relief-relief lain dalam pernyataan tuntutannya. Hakim tersebut sepatutnya memutuskan bahawa tindakan plaintif terhadap defendan kelima adalah untuk penzahiran sahaja.

[5] Maklumat yang telah dipohon oleh plaintif daripada defendan kelima merupakan suatu usaha untuk mengesahkan pembelaan yang dikemukakan oleh defendan-defendan pertama hingga keempat. Beban mewujudkan pembelaan bagi pelepasan pembayaran sudah tentunya terletak keatas defendan-defendan pertama hingga keempat, dan oleh yang demikian mereka haruslah dengan wajarnya menyokong pembelaan tersebut dengan mengemukakan keterangan dokumentar semasa yang perlu.

[6] Syarikat-syarikat peminjam di mana defendan-defendan pertama hingga keempat mendakwa bahawa pembayaran tersebut telah dimasukkan ke dalam akaun dengan defendan kelima, adalah merupakan syarikat-syarikat yang dikawal oleh plaintif dan adalah sukar untuk melihat mengapa syarikat-syarikat ini tidak membenarkan penzahiran maklumat yang dikehendaki walau apa pun s. 97 Akta Bank dan Institusi Kewangan.

[Rayuan dibenarkan dengan kos. Tuntutan plaintif terhadap defendan ditolak].

Cases referred to:

Shaw v. Smith [1986] 18 QBD 193 CA ***(refd)***
Norwich Pharmacal Co. v. Customs and Excise Commissioners [1974] AC 133 ***(foll)***
Upmann v. Elkan [1871] LR Eq. 140; 7 Ch. App. 130 ***(refd)***
Bankers Trust Company v. Shapira [1980] 1 WLR 1274 ***(refd)***
Loose v. Williamson [1978] 3 AER 89 ***(refd)***
Societe Romanaise de la Chaussure S. A. v. British Shoe Corp. Ltd. [1991] FSR 1 at 5 ***(refd)***
Ricci v. Chow [1987] 1 WLR 1658, CA ***(refd)***
British Steel v. Granada Television [1981] AC 1096 ***(refd)***
RCA v. Reddington Rare Records [1974] 1 WLR 1445 ***(refd)***

Legislation referred to:

Bankers' Books Evidence Act 1879 (UK)
Banking and Financial Institution Act, s. 97 & 50
Civil Law Act 1956, s. 3(1)(a)
Companies Act 1965 , s. 133A
Judicature Acts 1873 and 1875 (UK)
Rules of the High Court 1980, O. 18, r.19

Other sources referred to:

Annual Practice, 1993, Vol. 1, para 24/1/1, at p. 432 (UK)
Progress in the Administration of Justice during the Victorian Period in The Reign of Queen Victoria: A Survey of Fifty Years of Progress (1877), Vol. 1, pp. 281, 329, by T.H. Ward
Select Essays in Anglo-American Legal History (1907), Vol. 1, pp. 516-557

For the apellant - Cecil Abraham; M/s. Shearn, Delamore & Co.
For the respondent - K. S. Narayanan; M/s. K. S. Narayanan Associates

JUDGMENT

Edgar Joseph Jr. SCJ:

Broadly stated, the question which arose for decision in this appeal was whether the learned Judge in the High Court (Mr. Justice V. C. George) was right in refusing to strike out the action against the appellant, the First Malaysia Finance Bhd. (formerly known Central Malaysian Finance Bhd.), although the respondent's action against it was one for

discovery alone. The application to strike out was made under the provisions of Order 18, r. 19 of the Rules of High Court, 1980, and also under the inherent jurisdiction of the Court, on the ground that the statement of claim, insofar as it involved the fifth defendant, did not disclose a reasonable cause of action and also because it was frivolous, vexatious or an abuse of the process of the Court.

It would be more convenient, if we referred to the appellant and the respondent, as the plaintiff and the fifth defendant respectively.

The case for the plaintiff may be taken in substance from his statement of claim and is as follows:

At all material times, the plaintiff was and is a businessman and the beneficial owner of 11,979,333 ordinary shares of RM1 each in the fifth defendant ("the shares").

The first and the second defendants, Dato' Chen Lip Keong and Dato' Haji Abdul Rahman Hamzah, respectively, are business associates while the third and the fourth defendants Kemajuan Holdings Sdn. Bhd. and First Holdings Sdn. Bhd., respectively, are incorporated companies related to the first and the second defendants.

By several sale and purchase agreements in writing ("the Agreements") the plaintiff had contracted with the first, the second, the third and the fourth defendants, to sell the shares to them.

The mode of making payment of the purchase price of the shares to the plaintiff stipulated in the Agreements was that the first, the second, the third and the fourth defendants had the option of paying the moneys to the account of several companies under the control of the plaintiff and which had obtained loans from the fifth defendant, particulars whereof appear in Annexure K to the Agreements. Each of these loans were loans to related persons, and so contrary to s. 133A of the Companies Act and therefore illegal.

By reason of the purchase aforesaid, the first to the fourth defendants had taken over the management and control of the first defendant.

On 9 August 1990, the plaintiff had issued the writ herein against the defendants. The plaintiff's claim against the first, the second, the third and fourth defendants was for the purchase price of the shares.

By their Defence, the first, the second, the third and the fourth defendants claimed to have paid the purchase price towards the Annexure K loans for the benefit of the Annexure K borrower companies.

The plaintiff's claim as against the fifth defendant, was for certain information, that is to say, that, if, as alleged by the first, the second, the third and the fourth defendants, the purchase price had been paid by them into the Annexure K companies, then, the plaintiff wished to have discovery of the relevant accounts.

Before the learned Judge, it was contended on behalf of the fifth defendant, that there was no cause of action for information, especially since the information could be obtained by *subpoena*.

The learned Judge referred, first of all, to the principle that the right to discovery or inspection must have some foundation and must depend on some other right for which the authority is *Shaw v. Smith* [1986] 18 QBD 193 CA. But, he then added, that in the House of Lords case of *Norwich Pharmacal Co. v. Customs and Excise Commissioners* [1974] AC 133, it was held that in the special circumstances of that case an action for discovery alone can exist.

For the effect of the *Norwich Pharmacal* case the learned Judge referred to the following passage in the 1988 White Book at para 24/1/4 -

> An action for discovery alone does not lie against a defendant who is not himself a wrongdoer and has no connection with the wrongdoing. But where a defendant through no fault of his own (and whether voluntarily or not) 'has got mixed up in the tortious acts of others so as to facilitate their wrongdoing he may incur no personal liability but he comes under a duty to assist the person who had been wronged by giving him full information and disclosing the identity of the wrongdoers.

The learned Judge then reasoned as follows:

> In the instant case I do not think that anybody has, up to now, been accused of tortious acts. However wrongdoing by way of breach of contract and what could be

breach of trust on the part of the first to the fourth defendants is alleged. No allegation of wrongdoing is seriously made against the 5th defendant company save the accusation that it is holding on to securities that should be handed over to the plaintiff. However, and in any event, it is suggested in the statement of claim that the 5th defendant albeit through no fault of its own has, by being a company once controlled by the 1st to the 4th defendants and having the accounts and the securities of the Annexure K customers, got mixed up in the wrongdoing of the 1st to the 4th defendants and indirectly can be said to have facilitated such wrongdoing.

And, he concluded as follows:

In the circumstances I am constrained to the view that the situation here is more of a *Norwich Pharmacal Co.* situation than a *Shaw v. Smith* situation.

Accordingly, in the face of the plaintiff saying as he does by his statement of claim the 1st to the 4th defendants have done wrong and that the 5th defendant has information that will enable the plaintiff to bring home the wrong to the 1st to the 4th defendants and that in any event the 5th defendant has securities that should be given to the plaintiff, I do not think that I should accede to the invitation by the 5th defendant to summarily have the claim as against the 5th defendant struck off - at least in respect of the prayers set out in paragraph 17A(1) of the statement of claim. However I fail to see any basis at all for the order sought in the plaintiff's paragraph 17A(2).

Before us, Counsel for the fifth defendant had taken three separate points:

Firstly, it was argued that the fifth defendant says that there is no cause of action for information especially since the said information can be obtained by subpoena.

Secondly, the appellant says that their information sought is confidential as between banker and customer (that is, between the appellant and the K-annexure companies) pursuant to s. 97 of the Banking and Financial Institutions Act.

Thirdly, the appellant says that they are no longer proper defendant to this action because all its assets and liabilities (including the K-annexure loans) were taken over by order of Court pursuant to s. 50 of the Banking and Financial Institutions Act by Arab-Malaysian Finance Berhad.

In the *Norwich Pharmacal* case, Norwich Pharmacal owned a patent of a chemical called furazolidine. The Commissioners' of Customs and Excise published records showed that they had collected import duties from unnamed people who had brought the chemical into England. The importers were obviously violating *Norwich Pharmacal's* patent rights, and the importation could not have occurred unless the Commissioners of Customs and Excise had cleared the goods for entry. However, the Commissioners of Customs, in doing so, had committed no crime or wrong, their function being simply to ensure that the taxes were collected. The Customs refused to disclose the importers' names to Norwich Pharmacal. In an action brought by Norwich Pharmacal against Customs, the sole relief eventually sought (other claims having been made and then dropped) was that the Commissioners of Customs and Excise be ordered to disclose to Norwich Pharmacal the names of the importers.

On a summons for inspection of documents, the Commissioners claiming privilege against production of the relevant documents, Graham J. ordered discovery of the names and addresses of the importers.

On appeal, the Court of Appeal reversed that decision, and Norwich Pharmacal appealed. At the hearing of the appeal in the House of Lords, the appellants abandoned the contention that they had a cause of action for infringement by the Commissioners themselves and the appeal proceeded on the basis that the case was and always had been an action solely for discovery.

The House of Lords allowed the appeal, and restored the order of Graham J. allowing discovery.

All five members of the Court were unanimous in holding that the action for discovery existed but subject to certain defined circumstances.

Lord Reid reiterated the general rule that discovery to find the identity of the wrongdoer is available against anyone with whom the plaintiff has a cause of action in relation to the same wrong. This is how his Lordship put it:

So discovery to find the identity of a wrongdoer is available against anyone against whom the plaintiff has a cause of action in relation to the same wrong. It is not available against a person who has no other connection with the wrong

> than that he was a spectator or has some document relating to it in his possession.

To the general rule aforesaid, there is, however, an exception exemplified by the *Norwich Pharmacal* case; the exception being that if, through no fault of his own, a person gets mixed up in the tortious acts of others so as to facilitate their wrongdoing, whilst he may incur no personal liability, yet is under a legal duty to assist the person who has been wronged by giving him full information and in making disclosure of the identity of the wrongdoers. In the words of Lord Reid:

> My noble and learned friends, Lord Cross of Chelsea and Lord Kilbrandon, have dealt with the authorities. They are not very satisfactory, not always easy to reconcile and in the end inconclusive. On the whole I think they favour the appellants, and I am particularly impressed by the views expressed by Lord Romily M.R. and Lord Hatherley L.C. in *Upmann v. Elkan* [1871] LR 12 Eq. 140; 7 Ch. App. 130. They seem to me to point to a very reasonable principle that if through no fault of his own a person gets mixed up in the tortious acts of others so as to facilitate their wrong doing he may incur no personal liability but he comes under a duty to assist the person who has been wronged by giving him full information and disclosing the identity of the wrongdoers. I do not think that it matters whether he became so mixed up by voluntary action on his part or because it was his duty to do what he did. It may be that if this causes him expense the person seeking the information ought to reimburse him. But justice requires that he should co-operate in righting the wrong if he unwittingly facilitated its perpetration.

It is noteworthy that Lord Morris of Borth-y-Gest took the matter a step further when he defined the circumstances under which the possessor of information would come within the exception to the general rule; what he said was this:

> It is not suggested that in ordinary circumstances a court would require someone to impart to another some information which he may happen to have and which the latter would wish to have for the purpose of bringing some proceedings. At the very least the person possessing the information would have to have become actually involved (or actively concerned) in some transactions or arrangements as a result of which he has acquired the information.

Their Lordships of the House also directed their attention to the contention of Counsel for the respondent that the case came within the "mere witness" rule and so discovery could never be ordered. We need hardly add that the "mere witness" rule provides that information cannot be obtained by discovery from a person who will in due course be compellable to give that information, either by oral testimony as a witness, or by *subpoena duces tecum*.

In considering the particular information required by Norwich Pharmacal, their Lordships of the House, decided that the "mere witness" rule was not applicable. No less than four members of the House (Lord Reid, Lord Cross of Chelsea, Lord Morris of Borth-y-Gest and Lord Kilbrandon) decided that a witness was one who may be able to give testimony in either pending or anticipated proceedings. They observed that in the case before them, there were no pending proceedings nor would there be any anticipated proceedings unless Norwich Pharmacal received the assistance of the Courts. Lord Dilhorne said at p. 198:

> Someone involved in the transaction is not a mere witness. If he could be sued, even though there be no intention of suing him, he is not a mere witness ... and it matters not that the involvement or participation was innocent and in ignorance of the wrongdoing.

It is interesting to note that in the United Kingdom, there have been developments in this area of the law since *Norwich Pharmacal*; for example, the jurisdiction to order discovery in aid of tracing claims was first invoked in *Bankers Trust Company v. Shapira* [1980] 1 WLR 1274.

This case concerned a plaintiff bank in New York which has paid out $1,000,000 to two men who had presented forged cheques drawn on a Saudi bank. The plaintiff issued a writ against the two fraudsters and a London bank claiming to trace and recover the money. They obtained a Mareva injunction against the fraudsters and then sought an order requiring the bank to disclose to them forthwith correspondence, cheques and banking records relating to the accounts held by the fraudsters with the bank. At first instance the application was dismissed, on the ground that the fraudsters had not been

served. The Court of Appeal allowed the plaintiff's appeal notwithstanding that the order granted went far beyond any available under the Banker's Books Evidence Act 1879. Lord Denning MR regarded the power to order discovery as a very important part of the Court's armoury. He stressed that the jurisdiction must be exercised carefully, but thought that it was highly desirable that discovery should be ordered so that if the money had passed into the hands of third parties, it could be traced before they disposed of it elsewhere.

Another example of a development in this area of the law, in the United Kingdom, is *Loose v. Williamson* [1978] 3 AER 89 where the lessee of a shellfish fishery, who was concerned that poachers were removing mussels from banks on the foreshore, sued the owners of vessels that had been observed fishing unlawfully and obtained an order requiring the owners to give discovery by specifying the persons on board the vessels at specified times. The court found there was a great and imminent danger of irreparable damage to the fishery.

Loose v. Williamson shows that a plaintiff is entitled to discovery where the defendant is not mixed up innocently in the third party's wrongdoings but is jointly liable with him. In this context, *Societe Romanaise de la Chaussure S.A. v. British Shoe Corp. Ltd.* [1991] FSR 1 at 5, shows that disclosure of the wrongdoers' identity alone is not enough; the obligation extends to giving information. On the other hand, a person is not liable to disclose the identity of a tortfeasor if, although he knows that identity, he has not himself either committed or facilitated or otherwise got mixed up in the commission of that tort. (See *Ricci v. Chow* [1987] 1 WLR 1658, CA).

Yet another example of a development in this area of the law is *British Steel v. Granada Television* [1981] AC 1096 in which the company obtained an order requiring the television section to disclose the identity of the "mole" who had leaked confidential documents in breach of his contractual duty to the company. And, in *RCA v. Reddington Rare Records* [1974] 1 WLR 1445 an order was made in respect of copyright infringers.

At this point, we would interject to remark, that at one stage during the argument, Counsel for the first defendant, had asked us to consider whether *Norwich Pharmacal* was a consolidation of the early authorities or whether it made new law. If the former, then he suggested that the principles enunciated there could be applied in this country by virtue of s. 3(1)(a) of the Civil Law Act 1956, which provides that:

> Save so far as other provision has been made or may hereafter be made by any written law in force in Malaysia, the Court shall -
>
> (a) in West Malaysia or any part thereof, apply the common law of England and the rules of equity as administered in England on 7 April 1956.

The history of discovery and, in particular, the principles and powers exercised by the Courts in the United Kingdom are clearly and concisely set out in the **Annual Practice,** 1993, Vol. 1, para 24/1/1, at p. 432 and it is unnecessary to recapitulate that here.

Suffice it to say that the process of discovery was hardly known to the common law; it was the invention of equity. Indeed, the overriding purpose of the Bill in Chancery was, as it was said "to scrape the conscience of the defendant". [See per Lord Bowen in **Progress in the Administration of Justice during the Victorian Period in the Reign of Queen Victoria: A survey of Fifty Years of Progress** (1877), Vol. I, pp. 281, 329, edited by T.H. Ward and reprinted in **Select Essays in Anglo-American Legal History** (1907), Vol. I, pp. 516-557]. The original allegations first made in the Bill by way of narrative and charge were converted, as Lord Bowen put it:

> into a chain of subtly framed inquiries addressed to the defendant, minutely dovetailed and circuitously arranged so as to surround a slippery conscience and to stop up every earth. *(ibid).*

That was the position until the middle of the nineteenth century when it was somewhat improved by the Common Law Procedure Acts which conferred powers to order limited discovery of documents and answers to interrogatories. Then, by the Judicature Acts 1873 and 1875 and the rules of Court the process of discovery was made available in all divisions of the High Court.

We further note that in *Norwich Pharmacal,* Lord Reid refers to the view expressed by Lord Romily MR and Lord Heatherly L.C. in

Upman v. Elkan (ibid) (a case decided prior to the Judicature Act 1873, in which it was held that forwarding agents Elkan must inform Upmann of the identity of the consignor of goods infringing Upmann's trade mark) and said that he was "particularly impressed" by their views.

In our view, there can be no doubt that *Norwich Pharmacal* is in effect a consolidation of the early authorities on discovery, which the House had approved. We also note that the scope of *Norwich Pharmacal* is limited by the "mere witness" and "mere tort" rules. We would respectfully follow the principles enunciated by the House of Lords in the *Norwich Pharmacal* case and it was with those principles in mind that we turned to consider the particular circumstances of the present case in order to decide whether the Judge was right in making the order he did in fact make.

Unlike the *Norwich Pharmacal* case, the present case was one where the identity of those who were alleged by the plaintiff to have committed the wrongful acts *vis-a-vis* the plaintiff were known to the plaintiff and, indeed they had been cited as the first to the fourth defendants in the action. Again, the cause of action pleaded against the first to the fourth defendants was grounded in **contract** so there was no question of the plaintiff being able to invoke the exception defined by the House of Lords in the *Norwich Pharmacal* case, namely, that if through no fault of his own, a person gets involved in the **tortious acts** of others so as to facilitate their wrongdoing, whilst he may incur no personal liability, he comes under a duty to assist the person who has been wronged by giving him full information and disclosing the identity of the wrongdoers. So, on this ground alone, there was no question of the fifth defendant, being such a "person" within the meaning of the exception.

To take the point a little further, the obligation incurred by the first to the fourth defendants to make payments of the purchase price to the borrower's account being purely contractual, no third party could be said to be mixed up in a contractual situation because of the doctrine of privity.

The next question, we had to consider was whether the statement of claim disclosed a cause of action against the fifth defendant and, if so, what that was.

The Judge was of the view that although the claim against the fifth defendant was primarily one for discovery, there were also claims for an order restraining the fifth defendant from seeking to enforce the claim against the borrowers and/or securities in respect of the loan accounts referred to it "Annexure K" till the disposal of the action and also for damages.

It is true that the plaintiff had by his statement of claim prayed for a restraining order, and an order for damages and, indeed, we note, that he had also prayed for an order for release and transfer to the plaintiff of all securities in respect of the loan accounts in Annexure K together with any assignment of rights, the fifth defendant might have against the borrower companies and the securities under the loan accounts listed in Annexure K. But, these were merely prayers for reliefs and did not by themselves indicate what the cause of action was upon which the plaintiff was relying against the fifth defendant. It was for this reason that in the course of the hearing we had, more than once, specifically asked Counsel for the plaintiff, to classify the plaintiff's cause of action against the fifth defendant, but, apart from saying that his client's cause of action against the fifth defendant was primarily for discovery, he was unable to say what other cause of action was disclosed in the statement of claim against the fifth defendant.

We could quite understand the problem which Counsel for the plaintiff faced in having to answer our query because, quite frankly, having read and re-read the statement of claim we were unable to discern what the plaintiff's cause of action was against the fifth defendant, apart of course, from the cause of action for discovery, which was clear enough. It followed, that in our view, the Judge was in error, in holding, as he did in fact hold, "that **primarily** the plaintiff's claim against the fifth defendant is an action for discovery" merely because the plaintiff had also prayed in his statement of claim for the other reliefs to which we have adverted. The Judge ought to have held that the plaintiff's action against the fifth defendant was for discovery alone.

Similarly, we were also of the view, that the Judge was also in error, in holding that the plaintiff had brought himself within the ambit of the exception defined by the House of Lords in the *Norwich Pharmacal* case, for the reasons we have stated.

Looking back, the information which the plaintiff had sought from the fifth defendant was really an attempt to verify the defence advanced by the first to the fourth defendants of discharge by payment of the purchase price in accordance with the option as to the mode of payment of the price for the shares provided for in the agreements. The onus of establishing a defence of discharge by payment would clearly lie on the first to the fourth defendants, and it will therefore be for them to properly substantiate that defence by adducing the necessary contemporary documentary evidence. The Annexure K borrower companies into whose account with the fifth defendant, the first to the fourth defendants claimed to have made the payments, are all companies controlled by the plaintiff, and it is difficult to see why these companies may not authorise disclosure of the required information notwithstanding s. 97 of the Banking and Financial Institutions Act.

A final point needs to be made and it is this: a *Norwich Pharmacal* order being an equitable remedy will not be granted as of right even when the requirements for it are satisfied and, so, the Court has a discretion as to whether to grant or refuse it.

It follows that the fifth defendant having succeeded on his primary ground of appeal, it is unnecessary for us to delve into the other grounds of appeal.

In the result, we allowed the appeal and reversed the order of the learned Judge refusing to strike out the plaintiff's claim against the fifth defendant in respect of para 17A(1) of the statement of claim. It follows that the action, insofar as it involved the fifth defendant, was struck out. We also ordered costs here and below to the fifth defendant and refund of the deposit paid into Court by way of security for costs.

KUMPULAN SUA BETONG SDN. BHD.

v.

EZAN SDN. BHD. & ANOR.

SUPREME COURT, IPOH
TUN DATO' SERI ABDUL HAMID BIN OMAR LP, TAN SRI DATO' MOHD. EUSOFF BIN CHIN, DATUK MOHAMED DZAIDDIN BIN HJ. ABDULLAH SCJJ
[SUPREME COURT CIVIL APPEAL NO. 02-49-92]
10 JUNE 1993

LAND LAW: Sale and purchase of estate land - Sale and purchase agreement conditional upon approval of Estate Land Board - Approval not obtained - Land registered in name of purchaser - Vendor disputing transfer of land to purchaser - Whether approval of Estate Land Board required.

INTERPRETATION OF STATUTES: National Land Code 1965 s. 214A - Sale and purchase of estate land - Whether approval of Estate Land Board required - Sub-section creating penal offence - Introductory words to sub-section - Clear and plain meaning of words - Strict construction of words.

The appellant and the first respondent entered into a sale and purchase agreement for the sale of a portion of the Port Dickson-Lukut Estate, known as Lot 849, of which the appellant was the owner. Pursuant to one of the clauses of the agreement, the first respondent nominated the second respondent as the purchaser of Lot 849 which was consented to by the appellant. The second respondent paid the purchase price and Lot 849 was transferred and registered into the name of the second respondent.

About seven years after the execution of the agreement the appellant objected to the transfer of the land to the second respondent on the ground that no approval from the Estate Land Board for such transfer had been obtained contrary to the provisions of s. 214A of the National Land Code 1965 (NLC 1965).

Held:

[1] The requirement of the approval of the Estate Land Board was to be found in subsection (4) of s. 214A of the NLC 1965 which in clear, plain words stipulates that the application for approval is required only where the transfer, conveyance or disposal in any